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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309,
Petitioner,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C., U.S. GEOLOGICAL SURVEY, RESTON, VIRGINIA, AND FEDERAL LABOR RELATIONS AUTHORITY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY MEMORANDUM

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In *National Treasury Employees Union v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU*), the D.C. Circuit held that union-initiated midterm bargaining fell within the duty to bargain established by the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101, *et seq.* (the Statute). The Fourth Circuit has reached precisely the opposite conclusion in a series of decisions beginning with *Social Security Administration v. FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA*); it reiterated that conclusion most recently in the instant case. In its opposition brief, the respondent United States Geological Survey of the Department of the Interior (the Survey) labors unsuccessfully to obscure what the Fourth Circuit has itself

described as a "clear conflict" between it and the D.C. Circuit. Pet. App. 4a. The Survey's efforts to denigrate the importance of this case are similarly unavailing.

1. Seeking to avoid this Court's review of a decision holding that a federal agency is precluded by law from agreeing to a contract provision authorizing union-initiated midterm bargaining, even where the agency would prefer such an arrangement, the Survey urges that the conflicting views of the circuit courts are not "squarely presented." Resp. Br. 8. The Survey's tactic does not withstand scrutiny.

That the circuit courts are in direct conflict on the "specific dispute" (*id.* at 9) presented here could hardly be clearer. In this case, the Fourth Circuit held outside the duty to bargain a union contract proposal that would authorize the union to initiate midterm bargaining on negotiable subjects. In *NTEU*, the D.C. Circuit held that the Statute *requires* an agency employer to bargain over union-initiated proposals. As we have previously noted (Pet. at 6, n.2), it necessarily follows from *NTEU* that, in the D.C. Circuit, a union proposal providing for midterm bargaining would certainly fall within the duty to bargain. In short, the Fourth Circuit's ruling in the instant case is plainly at loggerheads with the D.C. Circuit's *NTEU* decision.

Indeed, it is ironic for the Justice Department, on behalf of the Survey, to argue that the "direct conflict" between the circuits is insufficiently presented by this case. In this litigation, the Justice Department has consistently argued, and the Fourth Circuit has agreed, that this case is governed by the court of appeals' decision in *SSA*. It was in *SSA*, of course, that the Fourth Circuit placed itself in conflict with *NTEU* by holding that any kind of union-initiated midterm bargaining was "contrary to" the Statute. *See United States Department of Energy v. FLRA*, 106 F.3d 1158, 1163 (4th Cir. 1997) (*DOE*)

(so characterizing the holding of *SSA* and finding that *SSA* "compels" its conclusion on the negotiability issue). Given its position below that the *SSA* decision controlled the court's decision here, the Justice Department is hard-pressed now to argue credibly that the rationale of *SSA*, which even it agrees is squarely in conflict with *NTEU*, is somehow insufficiently implicated.

Thus, the Survey's contention that this case would not resolve the conflict between the circuits is unpersuasive. A ruling by this Court in favor of petitioner would necessarily reject the Fourth Circuit's fundamental premise that union-initiated midterm bargaining is at odds with the Statute. As the Fourth Circuit has held (at the Justice Department's urging), repudiation of that crucial linchpin of the court of appeals' midterm bargaining cases "would effectively vitiate *SSA*" (*DOE*, 106 F.3d at 1163) and have the effect of extending the Statute's duty to bargain to union-initiated midterm proposals.

2. The Survey's efforts to minimize the importance of the parties' dispute are also unpersuasive.

a. First, the Survey suggests that the controversy here lacks sufficient "practical significance" in light of the D.C. Circuit's "expansive[]" view of the "covered by" doctrine. Resp. Br. 11. That doctrine, in essence, says that the parties need not negotiate over matters covered by a collective bargaining agreement during the term of the agreement. *See Dept. of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992). The Survey's apparent point is that, under the "covered by" doctrine, few matters are subject to mandatory midterm negotiation, on request, and, therefore, that resolution by this Court of a union's right, under the Statute, to initiate such bargaining would be gratuitous.

Such a view betrays a fundamental misapprehension of the realities of the collective bargaining process. It is one thing for labor and management to bilaterally forge an agreement that has the effect of limiting the circumstances

under which midterm bargaining can occur—a situation addressed by the "covered by" doctrine. But it is quite another matter for the federal labor statute to be construed as absolutely precluding a union from *ever* being able to initiate bargaining proposals midterm. It should be evident that there is a crucial difference between a *bargained-for* limitation on midterm prerogatives and one absolutely imposed by law. The Survey's failure to appreciate this difference apparently prompts its misguided argument concerning the relevance of the "covered by" doctrine.

The Survey is simply incorrect in suggesting that the "covered by" doctrine vitiates the importance of midterm bargaining. The parties may, consistent with that doctrine, negotiate midterm in three key areas. They may negotiate on any matter to the extent that both parties agree; they may negotiate, as a matter of right, on any negotiable matter *not* "covered by" the agreement; and they may negotiate as a matter of right, even on a matter "covered by" the agreement, where they had previously agreed to a contract clause permitting the reopening of that particular matter. That last example of midterm bargaining is particularly useful for new or experimental approaches to workplace problems.

As noted in our petition (at 17), labor and management may wish to experiment, during term negotiations, with respect to any number of issues. The parties, for instance, may want to try out new procedures for addressing health and safety problems in the workplace. It is entirely possible that a union would be amenable to such an experiment if it had the prerogative of initiating modifying proposals midterm. Under the "covered by" doctrine, the parties could agree to a clause permitting the reopening of a specific matter in order to revisit that issue in light of the newly gained experience. Under the Fourth Circuit's view of midterm bargaining, however, a proposal

for such a clause would be deemed contrary to the Statute and therefore flatly prohibited.

In short, the Survey's suggestion that the D.C. Circuit's views regarding the "covered by" doctrine undercut the importance to labor organizations of the instant case could not be more inaccurate.[1]

b. It is noteworthy that the Survey's opposition brief never comes to grips with petitioner's explanation of how the circuit conflict regarding midterm bargaining is undermining the rational administration of the Statute. As we have noted (Pet. at 7), that problem stems in part from the Statute's multiple venue provision, which provides for review of FLRA decisions in the D.C. Circuit or in the circuit where an aggrieved party resides or transacts business. 5 U.S.C. 7123(a).

Indeed, the Fourth Circuit has recognized that the split in the circuits, together with the Statute's venue provision, places the FLRA in a "difficult position," forced to act without knowing which court of appeals will ultimately review its decision. *DOE*, 106 F.3d at 1162, n.8. Armed with favorable Fourth Circuit precedent, federal agency employers—virtually all of whom "transact business" within that circuit—are now positioned to appeal midterm bargaining disputes to that court.

The prospect of continued litigation on the midterm bargaining issue is hardly hypothetical.[2] The FLRA has

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[1] It is curious that the Survey relies on the existence of the "covered by" doctrine as affirmative support for its argument that this Court should not hear this case. The Fourth Circuit in *SSA* relied upon the perceived *absence* of a "covered by" doctrine in the federal sector as support for its conclusion that midterm bargaining would unduly disrupt federal sector labor relations. *SSA*, 956 F.2d at 1289. The Survey would evidently now concede that this analytical basis for the Fourth Circuit's conclusion no longer exists—if, indeed, it ever did.

[2] The Survey states that judicial resolution of midterm bargaining disputes is uncommon. In fact, the issue raised by this litiga-

made clear its intention to adhere to its adoption of the D.C. Circuit's ruling in *NTEU*. As experience demonstrates, federal agency employers who transact business in the Fourth Circuit will continue to take advantage of the Statute's venue provisions by appealing those midterm bargaining decisions to that court. As a consequence, the court, the Authority, the agency employers and unions will all be required to expend their resources. Prolonging this state of affairs is patently wasteful and undermines all confidence that the Statute is being rationally administered. In short, there is a clear need for uniformity on the issue of midterm bargaining.

Finally, we take issue with the Survey's suggestion that because, thus far, only the Fourth Circuit has sided with the agency employers' view of midterm bargaining, the parties' dispute has no significant impact. To the many thousands of federal employees who work in one of the five states covered by the Fourth Circuit, it is of great moment that their collective bargaining representative has been stripped of the ability even to make midterm proposals. That concern is shared by the far greater number of employees who work for the numerous federal agencies that transact business within that court's jurisdiction.

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tion has been addressed in five separate decisions of the courts of appeals in 10 years. (In addition to the cases cited *supra*, there is also an unreported decision of the Fourth Circuit: *U.S. Patent and Trademark Office*, 45 FLRA 1090 (1992), *enforcement denied*, 991 F.2d 790 (4th Cir. 1993) (Table)). That is hardly a trivial number of cases; moreover, as explained, *supra*, litigation of the issue will certainly continue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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